Supreme Court, U.S.
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No. 92-605

In the Supreme Court of the United States.

October Term, 1992

GERALD AMIRAULT,
Petitioner,

v.

MICHAEL FAIR, COMMISSIONER,
DEPARTMENT OF CORRECTION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to determine whether the Court of Appeals properly concluded that a habeas corpus petitioner failed to demonstrate that a juror who had no memory of being a rape victim forty years previously was either actually or impliedly biased.

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ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Fair, Commissioner of Correction, respectfully requests this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner's appeal from the denial of his motion for new trial on grounds

of juror misconduct, expedited apart from the appeal from his convictions, is reported as Commonwealth v. Amirault, 399 Mass. 617, 506 N.E.2d 129 (1987) (Amirault I). His appeal from a renewed motion for new trial and from the convictions is reported as Commonwealth v. Amirault, 404 Mass. 221, 535 N.E.2d 193 (1989) (Amirault II).

The opinion of the United States District Court for the District of Massachusetts denying a petition for habeas corpus on October 7, 1991, is unreported. Appendix 8-29. On July 8, 1992, the United States Court of Appeals for the First Circuit affirmed the denial of the petition. Amirault v. Fair, 968 F.2d 1404 (1st Cir. 1992) (per curiam).

STATEMENT OF THE CASE

Petitioner Gerald Amirault was indicted by a Middlesex County, Massachusetts grand jury on fifteen indictments concerning nine different children, eight charging rape of a child and seven charging indecent assault and battery on a child under fourteen years. The charges involved multiple sexual assaults on male and female children who attended the Fells Acres Day School in Malden, Massachusetts from 1982 until the school closed in 1984. Petitioner, son of the school's owner and director, worked there as a bus driver, helped prepare meals and performed various maintenance tasks at the school. After a twelve week trial, he was convicted in July, 1986 on all indictments.

Jury impanelment lasted for eight days. Each seated juror answered three

written questionnaires, two of which had been specifically tailored for the case, and answered questions individually on voir dire. The potential jurors were asked, among other things, whether any family member or close friend had ever been a victim, witness or defendant in a criminal matter, and if so, whether the matter came to trial. The juror whose impartiality is challenged responded affirmatively to the first question and negatively to the second. On voir dire, she stated that her son had been charged with operating under the influence of alcohol and that the case never came to trial. She also stated that although she knew that the trial concerned child sexual abuse, she knew of no reason why she could not be fair and impartial if she was selected as a juror. Amirault I, 399 Mass. at 620-621, 506 N.E.2d at 132; App. 10-11.

Two days after the verdicts were returned, defense counsel received a telephone call from a man who informed the attorney that he believed that, while a teenager, the subject juror had accused the caller's cousin of rape, that the case had gone to court and his cousin had been sentenced to a prison term. Id. at 619, 506 N.E.2d at 131.

Counsel requested and received permission from the trial judge for access to criminal records in order to investigate the matter. The inquiry revealed that the juror's maiden name had been correctly provided by the caller along with certain other personal matters. On the basis of that corroborating information, counsel extended the scope of the investigation, and a private investigator was retained. Amirault I, 399 Mass. at 620, 506 N.E.2d at 132.

The judge ordered the juror to appear at an in camera hearing. Her order informed the juror that the juror was entitled to have counsel present and that the juror's attorney could view beforehand the documents relating to petitioner's motion for a new trial. Id. at 619-620, 506 N.E.2d at 131-132.

At the hearing, which was conducted in the presence of the petitioner and all counsel in the judge's chambers, the juror testified that she had no memory of being the victim of a crime.[1] She said that she knew that something had happened to her when she was a child but that it had to have been over forty years ago,[2] and she must have

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1/ The judge asked several initial questions of the juror. Subsequently, defense counsel and the prosecutor were given the opportunity to question her.

2/ The juror was fifty-four years old at the time of the hearing.

"blocked" the details from her mind. She also stated that because she had no memory of being the victim of any crime, she had answered the questions on the questionnaire truthfully, to the best of her knowledge. Finally, the juror stated that she decided the case solely on the evidence, and that because she had no memory of being the victim of a crime, she had never mentioned anything about such an experience at any time during the trial or the jury deliberation process.

Following the juror's testimony, the court clerk told counsel that when the juror's attorney called to make arrangements to see the papers on file in this case, he stated that something of a sexual nature had happened to the juror when she was twelve years old. Petitioner's counsel requested that the

court conduct further investigation of the juror and asked to call other witnesses and introduce psychiatric testimony to impeach the credibility of the juror. The trial judge considered what the clerk reported, but declined to extend the investigation or the hearing.

In her decision denying the motion for a new trial, the trial judge found that the juror had honestly answered the pretrial questions and that the nondisclosure of having been a victim of a sexual offense was unintentional. The judge stressed that her conclusion was supported by an incident that had occurred during the trial.[3/]

3/ The juror had reported to the judge, in chambers and on the record in the presence of all counsel, that the juror had stopped at the juror's place of employment to retrieve some personal -

(footnote continued)

The judge noted that had the juror harbored any hostility toward the petitioner, it is not likely that she would have reported the incident. She concluded that the juror was not actually biased toward the petitioner and there was no basis to support a finding of implied bias. Based on her observations of the juror during

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(footnote continued)

belongings. The juror had met a coworker who sought to engage the juror in conversation about the case. Specifically, the fellow worker had asked whether the juror knew a certain person whose daughter attended Fells Acres. The juror had admonished the coworker that the juror was not able to discuss anything connected to the case and the conversation had gone no further. The juror checked the witness list to make sure that the individual mentioned was not scheduled to testify at trial and did not discover that name listed. The list was reviewed again in chambers. The juror was returned to the jury without objection from either side.

impanelment, trial, and at the post-verdict hearing, the judge found the juror to be fair and impartial and predisposed to follow the instructions of the court to decide the case solely on the evidence produced at trial. She found that the juror was candid at the hearing and that if there was any nondisclosure, it was unintentional. These findings were upheld by the Supreme Judicial Court in Amirault I, 399 Mass. at 627, 506 N.E.2d at 136.

Subsequent to the decision in Amirault I, the petitioner filed a renewed motion for new trial based on the results of further investigation of this matter. In his renewed motion, he submitted an affidavit and court records to show that the juror had been raped on June 26, 1946, and that an application for a criminal complaint had been filed several days later. Following a

probable cause hearing, the case was bound over to the grand jury and in the Superior Court, the individual was found guilty.

In her order denying the renewed motion, the judge reviewed the new evidence submitted by the defendant and found that the renewed motion "addressed the prior event in the subject juror's life with greater specificity than the original motion," but, the additional information did not alter her original findings, conclusions and rulings on the issue.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS NOT APPROPRIATE IN THIS HABEAS CORPUS CASE WHERE THE LOWER COURT CORRECTLY FOUND PETITIONER FAILED TO PROVE A JUROR WAS EITHER ACTUALLY OR IMPLIEDLY BIASED.

A. Petitioner Was Afforded An Adequate Opportunity To Make Out His Claim Of Juror Bias.

In the Court of Appeals, petitioner conceded that "the trial court acted properly in conducting a post-conviction hearing to examine the juror and that trial court findings on questions of juror partiality are presumed correct under 28 U.S.C. § 2254(d) (1988)." Amirault v. Fair, 968 F.2d 1404, 1405 (1st Cir. 1992). His challenge to the presumption of correctness in the Court of Appeals was a claim that the trial judge's findings of impartiality were clearly erroneous as not supported by the record. Id.

In arguing the state court findings were erroneous, petitioner complains that he was "entirely precluded" (Petition at 7) from demonstrating the juror was untruthful and biased because

the judge denied his request to offer testimony of the court clerk and other witnesses. To the extent he now argues the state court findings should be denied the presumption of correctness because of inadequacies in the hearing process, that claim was not made below.

Petitioner was given an adequate opportunity to prove his allegation that the juror was biased as well as the factual underpinnings supporting his claim. Smith v. Phillips, 445 U.S. 209, 217 (1982). The judge granted him access to old criminal records, received and considered affidavits, and conducted an evidentiary hearing at which all parties were present and had a full opportunity to pose questions to the juror. The scope of the hearing was a matter within the discretion of the judge, and was well within the purposes outlined in Smith v. Phillips, 455 U.S.

at 225 (O'Connor, J., concurring). This is especially so given the fact that in presenting the renewed motion, after the Supreme Judicial Court had already rendered its decision in Amirault I, petitioner waived hearing and submitted his claim on affidavits and memoranda. Amirault II, 404 Mass. at 244, 535 N.E.2d at 207.

Once the judge concluded that the juror had honestly answered the voir dire questions and that her nondisclosure of having been a victim was unintentional, there was no reason to extend the hearing further. She did allow petitioner to make an offer of proof of what the clerk would say, but as the Supreme Judicial Court noted, and both federal courts agreed, "[t]he focus of the hearing was not whether the rape had actually occurred, but whether the juror was biased . . . . Once the judge

accepted the essential truth of the juror's testimony, the need for other witnesses evaporated." Amirault I, 399 Mass. at 627-628, 506 N.E.2d at 136. See Appendix 4 n.1; 17 n.1.

B. The Court Of Appeals Applied This Court's Precedents In Concluding Petitioner Did Not Prove The Juror Was Biased.

Contrary to the assertion in the petition (Petition at 5), the Court of Appeals did not find that the juror was not impartial. The lower court properly concluded that petitioner "failed to produce convincing evidence that the trial court's finding that the juror answered honestly the questions on voir dire was erroneous." Appendix 4.

Each court that considered this matter applied the method of evaluating juror partiality claims set forth in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

Both the state and habeas courts found that petitioner failed to prove the juror knowingly concealed anything on voir dire. The trial judge concluded that the juror honestly answered the voir dire questions, crediting the juror's testimony that she had forgotten about the incident. This was solely within the province of the judge, and is a matter given special deference on review in general, and in habeas proceedings in particular. Patton v. Yount, 467 U.S. 1025, 1036-1037 (1984). E.g. Hernandez v. New York, 111 S. Ct. 1859, 1869-1870 (1991); Rushen v. Spain, 464 U.S. 114, 120 (1983), citing Sumner v. Mata, 455 U.S. 591, 598 (1982), and Marshall v. Lonberger, 459 U.S. 422, 431-432 (1983).

The judge's factual findings have a solid basis in the record. They were

not, as petitioner claims (Petition at 7), made solely by accepting the juror's version without question. Rather, they were made after the judge had an opportunity to observe the juror during the voir dire and empanelment, at a mid-trial chambers conference, during the trial itself, and especially during the post-trial hearing where the juror testified. See United States v. Calabrese, 942 F.2d 218, 227 (3d Cir. 1991).

Simply crediting the juror's testimony is not forbidden, Smith v. Phillips, 455 U.S. at 217 n.7, but here the judge cited the bases for her conclusions that the juror was candid, that the misstatements were inadvertent, honest mistakes and ultimately, that the juror was not biased. The judge stressed that her findings were supported by the fact that during the trial the juror had

come forward with information that someone at her place of employment had tried to talk to her about the case. She noted that if this juror harbored any hostility toward petitioner, it was not likely she would have reported the incident which might have caused her to be removed from the jury.

Much of the evidence petitioner presented in support of his post-trial motions was directed toward proving that the juror was in fact the victim of rape as a teenager, and that she pursued the matter by testifying against her attacker in criminal proceedings. The proferred evidence did not show that the juror was dishonest in not mentioning it during the juror selection process. The juror never denied that something may have happened to her. Rather, she stated that she had no memory of being

the victim of a sexual offense, and therefore any failure to disclose was not intentional and her voir dire responses were honest. Petitioner's evidence which suggested that the juror was a rape victim did not impeach her testimony on this point nor render it incredible as matter of law. There are a number of plausible reasons why a person might "block out" memory of an unpleasant experience in his or her youth, particularly a sexual assault. The passage of time alone, forty years in this case, could also account for the absence of memory. See United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990) (relative was government lawyer 30 years before); United States v. Casamayor, 837 F.2d 1509, 1575 (11th Cir. 1988) (juror worked with and knew defendant 23 years previously). The

judge's findings were reasonable, based on her assessment and observations of the juror throughout the trial, the juror's demeanor and her testimony.

Even if it could be said that the juror was untruthful in failing to disclose her prior experience, petitioner would not be entitled to a habeas relief because there was no showing that such nondisclosure was motivated by bias toward the petitioner. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556 (only those motives for concealing information "that affect the juror's partiality can truly be said to affect the fairness of a trial"). See United States v. Columbo, 909 F.2d at 713 (credibility bolstered by absence of motive to lie).

Petitioner says that the second part of the McDonough test is also met in

this case because the juror's correct revelation of her past experience would have provided a valid basis for a challenge for cause. Insofar as in this case jurors were routinely excused on voir dire, it is possible that this juror would have been excused by the court. The trial judge indicated she did not apply the legal standard of cause in excusing prospective jurors. However, in a habeas proceeding, the federal courts are obliged to apply federal law, and grant relief only for violations of federal constitutional law. E.g. Ouimette v. Moran, 942 F.2d 1, 4 (1st Cir. 1991). In this circumstance, the "cause" described in the McDonough test must be "cause" as defined by federal constitutional law, not the so-called "law of the case" in petitioner's trial. Under the constitutional standard, excusal for

"cause" is reserved for those jurors who have such fixed opinions that they cannot judge impartially the guilt of the accused. Mu'min v. Virginia, ___ U.S. ___, 111 S. Ct. 1899, 1908 (1991), quoting Patton v. Yount, 467 U.S. at 1035. There is no basis for a finding that this juror could not impartially decide this case.

C. The Court of Appeals Correctly Concluded That This Is Not A Case Where Juror Bias Should Be Implied.

Petitioner claims that this case would provide this Court an opportunity to define the precise circumstances which would warrant a finding of implied juror bias, and argues that the Court of Appeals decision in this case runs contrary to the decisions of other courts in considering implied bias. Certiorari is not appropriate on this

ground because the facts of this case do not rise to the level of such extraordinary circumstances as might require bias to be implied, and the decision of the Court of Appeals is consistent with those of other courts which have considered and applied the doctrine.

The concept of implied juror bias is not new to this Court's jurisprudence. See Smith v. Phillips, 455 U.S. at 215-216; id. at 221-224 (O'Connor, J. concurring); id. at 232-239 (Marshall, Brennan & Stevens, JJ., dissenting); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556-557 (Blackmun, Stevens & O'Connor, JJ., concurring). A number of state and federal courts have applied the doctrine without difficulty. The delineation of the parameters of the doctrine that petitioner seeks is neither necessary or

appropriate. The doctrine by its nature is not susceptible of bright line rules because the determination of implied bias is uniquely fact-sensitive.

The Court of Appeals correctly concluded that this case does not present such an exceptional situation that the juror should be presumed biased as matter of law. It does not approach the examples cited by Justice O'Connor: "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness somehow involved in the criminal transaction." Smith v. Phillips, 455 U.S. at 222 (O'Connor, J., concurring). In Smith, this Court declined to impute bias to a juror who, during the trial, had sought

employment with the prosecution. Similarly, it declined to impute bias in Rushen v. Spain, 464 U.S. at 120-121, to a juror who had stated on voir dire that she had no personal knowledge of violent crimes, but who revealed mid-trial that a childhood friend had been the victim of a murder when evidence of that very murder was presented at the trial on which she served. In both instances, the Court deferred to the state courts' findings of no bias.

The incident attributed to juror's past in this case occurred forty years earlier and had nothing to do with the case against petitioner. While she was said to have been the victim of rape of a child, she would have been fourteen or fifteen years old at the time; and the nine children victims in this case were small children five years old and younger when they were abused. The rape

of young children, while technically the same offense, is factually very different from the rape of a teenager, and petitioner made no showing that the crime committed against the juror was similar in detail to the crimes of which he was convicted. The allegations in this case did not concern the juror having knowledge or experience with the defendant or any witness. That they suggested she was a victim of a sexual assault should not automatically impute bias to her.

The state and federal courts examined cases from other jurisdictions cited by petitioner which suggest that bias may be implied by a showing that a juror or a close family member has been involved in a situation similar to that on trial. As the District Court noted, each of the situations where bias has

been implied consistently have involved jurors who are aware of a material circumstance about their experience or their relationship to the case and intentionally fail to disclose it. E.g. United States ex rel. DeVita v. McCorkle, 248 F.2d 1, 8-9 (3d Cir.), cert. denied, 355 U.S. 873, reh. denied, 355 U.S. 908 (1957) (in capital case juror's purposeful concealment of his recent victimization of similar crime for which defendant on trial in capital case constituted actual demonstrated bias); Jackson v. United States, 395 F.2d 615, 616, 618 (D.C. Cir. 1968) (presumption of prejudice found in capital case where juror failed to disclose or even admit he was involved in a "love triangle" homicide similar to the case on trial); Government of Virgin Islands v. Bodle, 427 F.2d 532, 533-534 (3d Cir. 1970) (juror's intentional

failure to reveal in rape trial that his sister was victim of rape and homicide warrants reversal under supervisory powers not constitution); United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979) (juror failed to disclose at drug trafficking trial that his two sons were currently serving prison terms for murder-robbery committed to acquire drugs); United States v. Bynum, 634 F.2d 768 (4th Cir. 1980) (juror's knowing failure to disclose, because ashamed, that he had several relatives who had been convicted of crimes warrants new trial); United States v. Perkins, 7748 F.2d 1519 (11th Cir. 1984) (juror lied when said he was not acquainted with defendant or involved in two prior similar cases; bias presumed); United States v. Scott, 854 F.2d 697 (5th Cir. 1988) (juror's knowing failure to

disclose that his brother was deputy sheriff in office that assisted in investigation because he did not think it relevant warrants bias finding); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) (in trial of woman whose defense to killing husband was that she suffered from long term battered woman's syndrome, juror knowingly failed to disclose she and her children were victims of long term spousal abuse continuing through time of the trial). But see Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991) (no implied bias where juror in rape trial did not recall at voir dire that she counseled rape victim, but remembered it during trial and did not disclose). Cf. United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977) (two jurors who worked for bank that was robbed should have

been excused for cause; employment relationship and reasonable apprehension of violence presumes bias). That the juror was unaware of a prior incident which was not factually similar to the case on trial, and did not intentionally fail to disclose it, makes this case inappropriate for applying an implied bias analysis.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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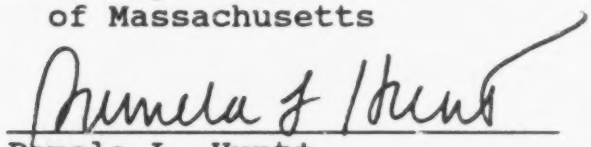

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